SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

BRASWELL MOTOR FREIGHT LINES, INC., and CLARINDA K. SHAYLER, INDIVIDUALLY AND AS EXECUTRIX AND SOLE DEVISEE OF THE ESTATE OF WARREN G. SHAYLER, DECEASED,
Appellants

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL,
Appellees

On Appeal from the United States District Court
For the Western District of Texas, El Paso Division

Jurisdictional Statement

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OPINIONS BELOW

The opinion of the District Court is reported at ..... Fed. Supp. ..... (*Appendix A*, pp. A-1 - A-10, infra.), reported at 1966-1967 Federal Carriers Cases, ¶ 81,938. The report of the Interstate Commerce Commission (*Appendix B*, pp. B-1 - B-32, infra.) is printed at 101 M.C.C. 1. The Report of the Examiner is attached hereto as *Appendix C*, pp. C-1 - C-67, infra.

JURISDICTION

This Action was originally brought under *28 U.S.C. 1336, 1398, 2284* and *2321-2325*, to set aside a portion of an order of the Interstate Commerce Commission.

The final judgment of the District Court (*Appendix A*, pp. A-1 - A-10, infra.) was entered on 14 July 1967. Appellants herein filed notice of appeal on 11 September 1967.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by *28 U.S.C. 1253*, *2101(b)*, and *49 U.S.C. 305(g)* and *(h)*; *Alton R. Co. vs. United States*, 315 U.S. 15; *Federal Communications Commission vs. RCA Communications, Inc.*, 346 U.S. 86.

STATUTES INVOLVED

Section 5(2)(a), 49 U.S.C. 5(2)(a), requires prior approval of the Interstate Commerce Commission for all unifications, mergers, and acquisitions of control of two or more carriers. In this connection, *Section 5(2)(a)(i), 49 U.S.C. 5(2)(a)(i)*, provides:

> "§ 5, par. (2). Unifications, mergers, and acquisitions of control.
>
> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> "(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a per-

son which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;"

Section 5(2)(b), 49 U.S.C. 5(2)(b) provides:

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a

carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Section 5(2)(c), 49 U.S.C. 5(2)(c) provides:

"In passing upon any proposed transaction, under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Section 7(d), 5 U.S.C. 1006(d), provides:

"(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely

request be afforded an opportunity to show the contract."

Section 210a(b), 49 U.S.C. 310a(b), provides for grant of temporary authority as follows:

> "(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."

Section 10, Administrative Procedure Act, 5 U.S.C. 1009, provides for judicial review, and as pertinent here *Section 10(e), 5 U.S.C. 1009(e)*, provides as follows:

> "(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed;

and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The National Transportation Policy sets out the overriding considerations in an acquisition proceeding.[1]

---

[1] "National Transportation Policy: 'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.'"

NATURE OF THE CASE

By application filed 11 February 1963 Braswell Freight Lines, Inc., of El Paso, Texas, hereinafter called Braswell Freight, and Clarinda K. Shayler, Individually and as Executrix and Sole Devisee of the Estate of Warren G. Shayler, Deceased, hereinafter called Vendor, sought authority under Section 5(2) of the Interstate Commerce Act, *49 U.S.C. 5(2)*, for approval by said Commission of Braswell Freight's purchase of Vendor's certificate of convenience and necessity No. MC-70380 for the sum of $250,000.00. The Vendor's operations have their roots in a "grandfather" application.

By the same application J. V. Braswell of El Paso, Texas, who controlled Vendee, Braswell Freight, through ownership of 99% of the capital stock of Braswell Motor Freight Lines, Inc., hereinafter called Braswell Motor, which in turn owned 100% of the capital stock of Braswell Freight, sought authority under Section 5 to acquire control of the operating rights of Vendee. While said application was pending, Braswell Motor and Braswell Freight were merged, with Braswell Motor as the surviving corporation. Braswell Motor was thereupon substituted as Vendee. See footnote 3 of the Commission's decision herein.

By joint application, also filed on 11 February 1963, the parties sought authority under *Section 210(a)(b), 49 U.S.C. 310(a)(b)*, for approval of temporary operations by Braswell Freight pending final determination of the Section 5 proceeding. Temporary authority operation was granted by the Commission on 25 Feb-

ruary 1963, and such operation began as of 18 March 1963.

The application was set for hearing before an examiner and hearing was held in Oklahoma City, Oklahoma, beginning 4 November 1963, concluded on 15 November 1963. The application was supported by seventy (70) public witnesses—shippers or receivers of freight.

The examiner's report and recommended order was served on the parties 29 December 1964. Exceptions were filed under the Commission's procedural rules, and applicants replied. Commission's Division 3, an appellate division, entered its decision on 20 December served on the parties on 30 December 1965.

Braswell Motor filed petition for reconsideration. It requested, first, that the Commission take official notice of its own records, and, second, that the record be reopened for receipt of such records in evidence. Final action of the Commission came on 19 July 1966, not served upon the parties, however, until 6 September 1966.

The Interstate Commerce Commission found that the proposed acquisition should be approved, 101 M.C.C. 1, *(Appendix B)*; but, so far as pertinent here, found that such approval should be conditioned as follows: "(T)hat the operating authority acquired from Warren G. Shayler, W. Thurman Shayler, Guardian (Clarinda K. Shayler, Executrix), shall not be combined or joined with any other authority presently held by Braswell Motor Freight Lines, Inc., for

the purpose of providing single-line service to or from points in Arizona and California."

The core of the question presented is whether or not in a Section 5(2) application, where the statutory standard is "public interest," existing carriers are entitled to protection.

The answer must, of course, depend upon the answer to several coordinate issues, each of which is equally important. And it may be noted here and now that the public interest transcends competitive effect. By Congressionally prescribed standards, by the Administrative Procedure Act, and by the National Transportation Policy, the Congress has made this clear and has undertaken to secure the public interest. It is clear that, although existing carriers are a part of the public, they are only one small segment of it, and that their interest must yield to the greater national public interest.

The coordinate issues will develop as we proceed.

QUESTIONS PRESENTED

Although *Section 5(2)(b)* prescribed "the public interest" as the criteria in unifications, mergers and acquisitions, the Interstate Commerce Commission applied the criteria of "public convenience and necessity" as fixed in *Section 207, 49 U.S.C. 307*, applications for new or initial certificates, and held that, as to Arizona and California points, "*Where the institution of a new service is proposed*, applicants must show a need therefor" and that "In our opinion the record here is clear that approval of the instant transaction would have

a substantial adverse effect upon existing carriers operating from and to points in Arizona and California."

The District Court said that the question for review was: "Whether the Commission's conclusion (101 M.C.C. 1) that the Braswell acquisition of the Shayler rights was consistent with the public interest subject to the restriction against use of the unified rights for the providing of single-line service to and from points in Arizona and California is supported by adequate findings based upon substantial evidence and is in accord with applicable law."

The District Court, tracking the Commission, found that the service proposed by Braswell Motor Freight Lines, Inc., "would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier."

Again tracking the Interstate Commerce Commission, the Court said that "Because of its strong financial condition and ability to perform a single-line service to and from points in the vendor's territory, it could reasonably be expected to continue and in all likelihood to increase the amount of traffic handled under the temporary permit."

The Court concluded, however, that:

> "*The most important issue involved* in this case *is not* whether the protestants showed that an unrestricted approval of the acquisition by Braswell *would have a materially adverse effect* on their operations *but whether Braswell proved a public need for the new service.* The finding of

the Commission that it failed to do so is supported by substantial evidence." (Emphasis ours).

But the question is not "public need," i.e., convenience and necessity. It is the "public interest."

The issues necessarily determinative of the crucial question, hereinabove called the core of the case, are:

1. Did the Interstate Commerce Commission misapply statutory standards in this Section 5(2) proceeding?

2. Did the Interstate Commerce Commission make adequate basic findings in this Section 5 proceeding and the reasons therefor as required by *5 U.S.C. 1007(b)*, such as to enable the Court to intelligently determine the basis of the Commission's action?

3. In proceedings involving issues of the nature here presented, the critical issue is *whether* and *to what extent* existing carriers will be faced with a new competitive service *rather than* an improvement of an existing service; and, in the event it is found that a new service would evolve, would compensatory public benefits offset the detriment to the public that might result from any adverse effect on the services and operations of competing carriers.

4. Did the Interstate Commerce Commission in wholly failing to address itself to the foregoing question, and the Court in ignoring it, violate statutory criteria and the overriding National Transportation Policy and thus result in an order which is so arbitrary, capricious and an abuse of discretion, that it is

violative of *Section 10(e)* of the *Administrative Procedure Act, 5 U.S.C. 1009(e)*, that it must be set aside?

5. In a proceeding involving issues such as here presented, did the Interstate Commerce Commission grossly abuse its discretion *(Section 10(e), Administrative Procedure Act)* in making a mere predictive forecast of adverse effect on competitors, when after more than two full years of operation under temporary authority, the means for an exact determination being at its command, it refused to take official notice of its own records *(Section 7(d), Administrative Procedure Act)* and refused to reopen the record, timely request having been made, for receipt of those records in evidence?

6. Did the Interstate Commerce Commission in refusing to reopen the proceeding for the purpose of receiving in evidence *Appendix E* hereof plainly violate the "rule of prejudicial error"? *5 U.S.C. 1009(e)*, last sentence?

7. Did the Interstate Commerce Commission, in failing to take into account the revenues, tonnages and operating ratios for nine months of competitive operations under temporary authority, clearly establishing no adverse effect (collated in footnote 3 as taken from the Examiner's Report, Appendix 3), plainly violate the "rule of prejudicial error"? (Last sentence of *5 U.S.C. 1009(e)*).

THE QUESTIONS ARE SUBSTANTIAL

The questions presented are substantial and highly important to the public interest. The District Court, reciting some platitudes of administrative law, never reached the crucial questions. It is certainly a substantial question when the issue in substance is whether the Interstate Commerce Commission may in a Section 5 proceeding apply, with immunity, the criteria applicable to a Section 207 proceeding. The criteria in Section 207 proceedings is vastly different, convenience and necessity—need for the service, from the criteria provided in a Section 5(2) proceeding, public interest. Congress prescribed each criteria in very different language and obviously intentionally so, especially in view of the overriding National Transportation Policy.

Section 207(a), 49 U.S.C. 307(a), "a certificate will be issued . . . if it be found that . . . the proposed service . . . is or will be required by the present or future public convenience and necessity."

But compare *Section 5(2)(b)*, "whenever a transaction is proposed under subdivision (a) . . . If the Commission finds . . . that . . . the proposed transaction . . . will be *consistent with the public interest* it shall enter an order approving" etc.

"Public interest" and the National Transportation Policy are the sole criteria. The factors to be considered in a Section 5(2) proceeding are set out in *Section 5(2)(b)* and emphasized in *McLean Trucking Co.*

vs. United States, 321 U.S. 67 (75-76).[2]

But the Commission nowhere in its decision addressed itself to the question of "public interest" and the factors mentioned by this Court in *McLean Trucking Co.*, supra. Instead the Commission found that in this Section 5 proceeding applicants had to prove a need, convenience and necessity, the Section 207 criteria, for what it called a new service, in an end to end joinder of old and long established routes.

Then the Commission's finding was that competing carriers would be substantially adversely affected, not that their service was adequate. The Commission simply rolled the criteria of Section 207 and 5(2)(b) into one ball of wax and came up with such a confused decision that it is impossible to tell, based upon statutory standards, whether it is fish or fowl, i.e., what criteria it did apply. Apparently the Commission applied the criteria of Section 207.

The Interstate Commerce Commission has, of course, a broad discretion but "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Federal Communications Commission vs. RCA Communications, Inc.*,

[2]In *McLean's* case it is said: "The Commission is empowered to authorize and approve a consolidation either as applied for or as qualified by such terms and conditions as it deems 'just and reasonable,' if it finds that the merger 'will be consistent with the public interest.' Section 5(2)(b). In passing upon a proposed consolidation the Commission is required to 'give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.' Sections 5(2)(c)."

346 U.S. 86, 90; *Burlington Truck Lines, vs. United States*, 371 U.S. 156, 167. And the Interstate Commerce Commission must exercise its discretion under *Section 5(2)(b)* within the bounds expressed by the standard of "public interest."

To further secure that actions of administrative agencies be kept within statutory standards and criteria, the Congress felt it necessary to enact the *Administrative Procedure Act, 5 U.S.C. 1001* et seq. In this case *Sections 7(d), 5 U.S.C. 1006(d)* and *10(e) 5 U.S.C. 1009(e)*, must be taken into account, for the Commission's order here is violative of each.

STATEMENT

The issue here is "public interest." Considering the Commission's order here in context and entirety, the final controlling issue was, and it is, whether approval of the transaction would have such a substantial adverse effect upon existing competitive carriers that such adverse effect outweighs the resulting advantages to the public.

The record here is clear that Vendee had operated in competition with existing carriers a part of the first quarter of 1963, all of the second and third quarters and a part of the fourth quarter of 1963. See Report of Examiner, *Appendix C*, pp. C-1 - C-67. To determine the foregoing question the Examiner compared protestants' 1962 operating ratios with their operating ratios for the first three quarters of 1963

with the results shown below.[3] These had been offered in evidence.

The operating ratios used *were in evidence* and were taken from the Interstate Commerce Commission's own records in the form of reports required by *Section 220(a)* and *(b)*, *Motor Carrier Act of 1935*, *49 U.S.C. 320(a)* and *(b)*, by all motor carriers to said Commission. It will be noticed that although Vendee was operating in competition with the existing carriers during that 1963 period, the operating ratios remained steady—in other words, Vendee's competition showed no adverse effect whatsoever, even though that was the period of operation which was so "startling" to the Commission. *Appendix B*, p. B-24.

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[3]

Carrier	*OPERATING RATIOS*			
	1962	*1963*		
		First Quarter	*Second Quarter*	*Third Quarter*
Be-Mac	91.5	95.2	91.7	90.5
Campbell	92.3	97.3	89.5	92.4
Forwarding	94.8	94.8	92.7	92.9
Freightways	98.9	103.3	98.8	95.0
Denver-Chicago	91.1	93.6	90.1	86.6
Texas-Arizona	91.3	94.0	90.7	91.3
ICX	92.6	97.7	94.2	93.4
Lee Way	95.8	98.5	94.9	98.1
Navajo	97.2	98.9	96.2	94.3
PIE	94.0	97.2	93.6	93.4
Ringsby	95.3	95.9	95.2	95.8
Roadway	90.6	93.8	89.3	89.3
Southwestern	98.9	99.5	94.8	96.6
Arizona	95.5	94.5	94.8	95.2
Transcon	87.1	88.8	85.6	84.3
Watson	103.5	105.6	99.8	96.1
Viking	96.6	99.8	93.5	93.6
Western	99.3	91.9	96.1	97.3
Gillette	94.3	89.5	94.2	94.5
Voss	95.5	111.8	100.1	86.7

By the time the Commission, or its Division 3, acted upon the application, Vendee had been operating in competition with existing carriers for all of the fourth quarter of 1963, all of the year 1964, and the first three quarters of 1965, and before the Commission overruled the petition for reconsideration the competition covered all of 1965 and part of 1966.

If the Commission had not been so "startling(ed)" by resulting use by the public, which in our opinion showed an imperative need for the service, it surely would, well knowing the real issue—"public interest" —have taken a tip from the operating ratios for the 1963 period and have taken official notice, *Administrative Procedure Act, Section 7(d), 5 U.S.C. 1006(d)*, of operating ratios for all of the years 1963, 1964, and at least the first three quarters of 1965. These operating ratios *would have given the exact answer* rather than a speculative conclusion which turned out to be false, and would have demonstrated beyond question of doubt that Vendee's temporary operations over that long period of time had had no adverse effect whatsoever upon existing carriers. Not only that, but had the Commission taken notice of its own records, prepared and filed by the competing carriers themselves, those records would have shown beyond peradventure of doubt an imperative need for the joinder of the Braswell-Shayler routes, else why the extensive use; and most importantly that existing carriers had not been adversely affected but that there had been no effect whatever. None! Most, if not all, of the intervening appellees here had, as *Appendix E* hereof

shows, increased their revenues and tonnages and had equally as good or even better operating ratios.

But the Commission did not do that, even though it is so authorized by *Section 7(d)* of the *Administrative Procedure Act*, and even though the results of the competitive operations, shown in footnote 3, strongly suggested that it be done, and *Section 5(2)(c)*, *49 U.S.C. 5(2)(c)*, sets it out as one of the issues to be determined, and the National Transportation Policy demanded it. In this the Commission also disregarded the "rule of prejudicial error." *5 U.S.C. 1009(e)*, last sentence.

And let it be said that a fair determination, both to the applicants and the *public*, demanded it. See the "rule of prejudicial error," supra.

The Commission refused to take official notice although *Section 7(d)*, *5 U.S.C. 1006(d)* authorizes it, and although the real issue demanded it. For says the Commission in a comparable case:

> "*In view thereof and of the issues presented*, we believe that we should take official notice of the data contained in such reports for those carriers interlining with Transport, for the years 1958 and 1959, insofar as it shows their operating net income or deficit, and their operating ratio. In so doing, and in consonance with the provisions of section 7(d) of the Administrative Procedure Act, the effectiveness of our prior order will be deferred for a sufficient period to allow any party herein to petition for reopening of the proceeding for a further hearing for the purpose of showing reasons, if any, why the referred to data should

not be considered." *Transport Motor Express, Inc. —Purchase—Marfise*, 85 M.C.C. 447, 456-457, Cf. *Market Street R.Co. vs. Commission*, 324 U.S. 548, and *State of Wisconsin vs. Federal Power Commission*, 201 Fed.2d 183, cited in *Marfise*, supra.

The issue of consistency with the public interest, in this case boiled down to a finding by the Commission "that approval of the instant transaction would have a substantial adverse effect upon existing carriers operating from and to points in Arizona and California," Commission decision, 101 M.C.C. at page 17 (*Appendix B*, p. B-27), it does seem positive, as the Commission said in *Transport Motor Express, Inc.— Purchase—Marfise*, supra, that:

> "Despite the foregoing, *in order for us to appraise intelligently the likely competitive effect* of the transaction on the operation of protestants, it is necessary to possess some information" etc. (Emphasis ours), p. 456.

It was as necessary here if the Commission was "*to appraise intelligently.*" However, the Commission made its determination purely on a speculative conclusion. The speculative forecast (conclusion) is without substantial evidence to support it. The only probative evidence is to the contrary. See footnote 3, operating ratios of protesting carriers, during a nine month competitive period. The protesting carriers had themselves, at the hearing, put into the record their operating reports showing revenues, tonnages and operating ratios, summarized in *Appendix D* attached hereto.

Protesting carriers, actually only some of them, filed exceptions to the Examiner's Report. In applicants' reply dated 9 April 1965 Vendor and Vendee requested the Interstate Commerce Commission to take official notice of its own records (made by the carriers themselves), and to make it easy there was incorporated in said reply the protestants' revenue, tonnage and operating ratio of each protestant for the years 1962, 1963, and 1964. That compilation is attached hereto as *Appendix E*. Protestants filed motions to strike *Appendix E*. The Commission did not strike but closed its eyes to the obvious, and, for some unknown reason, apparently preferred to make an obviously erroneous predictive forecast (even with the evidence before it—*Appendix D*) rather than to open its eyes to realities. But by so doing the Commission ran afoul of the rule of prejudicial error.

The uncanny thing is that the Commission denied, although *its chief concern was not protection of existing carriers* but to the contrary to ascertain where the public interest lay. The Commission's search for the truth should have been the really important thing, guardian of the public interest as it is, but apparently the Commission having a choice, as in *Transport Motor Express, Inc.—Purchase—Marfise*, 85 M.C.C. 447, chose to close its eyes to reality and make a highly speculative predictive conclusion which both *Appendices D* and *E* conclusively show to be utterly and completely fallacious.

The Interstate Commerce Commission cast its first principal conclusion in terms of the statutory stand-

ards of a Section 207 (public convenience and necessity) proceeding. This is clearly and plainly improper and erroneous and requires reversal, for this case is controlled by the statutory standards prescribed for a *Section 5(2)(a)* and *5(2)(b)* proceeding. There is no room for choice. *To choose is to exceed statutory authority.* It is arbitrary action condemned by *Section 10(e)* of the *Administrative Procedure Act.*

Said Commission's second principal conclusion is cast in terms only partially applicable to a Section 5(2) proceeding. It is merely one factor which is to be considered.

However, if the second principal conclusion, i.e., that competing carriers would be substantially adversely affected, then it became the duty of the Commission to weigh such adverse effects against the advantages to the public and make a determination of where the public interest lay, i.e., whether in the circumstances the public interest in "adequate, economical and efficient service," outbalances whatever public interest there is in protecting existing carriers' revenues in order to "foster sound economic conditions in transportation and among the several carriers." *National Transportation Policy, 49 U.S.C. preceding Sections 1, 301; McLean Trucking Co. vs. United States,* 321 U.S. 67, 76.

It is not clear, and we do not know, what the Commission intended. This Honorable Court must know, for "a simple but fundamental rule of law" is "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is

authorized to make, *must judge the propriety of such action solely by the grounds invoked by the agency.* If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." (Emphasis ours). *Securities and Exchange Commission vs. Chenery Corporation*, 332 U.S. 194, 196.

Nowhere in the Commission's decision, not even once in any respect, did the Commission weigh the evidence to determine where the public interest lay. Not even one finding of fact did the Commission make in respect to "public interest." Unless, of course, the finding of substantial adverse effect on existing carriers was so intended. But the finding just referred to was one, but only one, factor and it was never correlated to any other necessarily required finding.

Moreover, that cannot be considered to be the case because the Commission preceded that finding with the statement: "In the absence of evidence of the inadequacy of existing services, or of a showing of need for the service proposed, protestants are *entitled to protection* from the establishment of additional competition," 101 M.C.C. at page 17 (*Appendix B*, p. B-26). That is not true in a Section 5(2) proceeding.

That obviously takes the Commission right back to its falacious pursuit of application of the statutory standards of a Section 207 application; hence confirms the Commission's misapplication of statutory standards.

For the Court to determine whether the agency has

exercised its discretion within the bounds of statutory standards, "it must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it." *Burlington Truck Lines vs. United States*, 371 U.S. 156, 167; *Federal Communications Commission vs. RCA Communications, Inc.*, 346 U.S. 86, 91.

The naked fact is that, in this Section 5 proceeding, the Commission's decision discloses no rational or competent basis for the exercise of its administrative discretion in the application of the Section 5 statutory standards. The Court should not be compelled to guess. *Atchison T.&S.F. R. Co. vs. United States*, 295 U.S. 193, 201-203. The court there "*repelled the suggestion that lack of express findings by an administrative agency may be supplied by implication.*" (Emphasis ours), citing other cases.

The surprising, if not shocking, thing about the District Court decision is that *it rests entirely upon a Commission decision*, cited as *Pacific Intermountain Express Co. — (Control and Purchase) — Keeshin Freight Lines, Inc., et al*, 57 M.C.C. 341, affirmed by the Commission, 57 M.C.C. 467, and based thereon the District Court holds:

> "Since the public interest requires that carriers already in a territory *be protected, it is immaterial* whether the attempt to invade is through an application under Section 5 or one under Section 207."

This holding illustrates how far afield the District Court went in sustaining the Commission. This hold-

ing would amount to a rule of property, completely contrary to law. The Commission knows this and has never recognized the alleged principle. However, based upon the Commission's decision herein, that was all the District Court had to take hold of.

It is all the more surprising, if not shocking, to note that had the District Court exercised a careful investigation, rather than grab hold at any place it could grab, the District Court would have found that even the Commission has taken notice of the fact that *Pacific Intermountain Express Co.*, supra, had been misinterpreted and the Commission had tried to straighten things out in *Consolidated Freightways, Inc. — Control — Silver Fleet*, 85 M.C.C. 139, 189, saying:

> "In view of the foregoing, we believe it is apparent that the carrier protestants have misinterpreted the scope of the findings contained in the *Keeshin* case. While it is true that, as they contend, we found in such proceeding that the lack of substantial interchange between the applicants would have resulted in the creation of a 'new competitive service,' denial therein was based solely upon the adverse effect the transaction would have produced on the services and operations of competing carriers and the absence of any showing that approval of the transaction would result in offsetting advantages to the public."

The Commission then went on to try to set out the issues involved, saying:

> "The importance in a section 5 proceeding of

the factor of the quantum of traffic interlined in the past by applicants pertains entirely to the greater issue of the manner and extent which a transaction will affect the operations of competing carriers. In other words, a substantial interline of traffic between applicants in the past is generally indicative of the fact that existing carriers have already been faced with, and adjusted to, the competition of their joint-line service. Under these circumstances it can be fairly concluded, in most instances, that approval of a transaction would cause little impairment in the existing services of competing carriers. At the opposite extreme, in instances where applicants have not interlined traffic moving between their respective areas of operation with one another or other carriers, it is similarly evident that their unification could readily result in serious disruption of the present competitive balance and the impairment of the operations and services of competing carriers. *It should be emphasized, however, that past interchange constitutes only one element in our appraisal of the effects a transaction would likely have upon the operations and services of existing carriers, and, by itself, is not controlling in the determination of the ultimate issue.* (Emphasis ours) Compare *Transcon Lines—Purchase—B & M Exp., Inc.*, 75 M.C.C. 693, and also *Transcon Lines—Purchase—Missouri-Oklahoma Exp., Inc.*, 80 M.C.C. 79."

Equally surprising is the fact that the District Court completely *overlooked* in *Pacific Intermountain Express* a correct statement therein, *construing the Commission's duty in a Section 5 proceeding*, supra, at page 470, as follows:

"Before we may approve a transaction under section 5 of the act, we must find that it will be consistent with the public interest, a concept which has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.' *New York Central Securities Corp. v. United States*, 287 U.S. 12, 25. Such a concept obviously embraces the interest of competing carriers as well as that of shippers and consignees. We appreciate that, contrary to the situation in a proceeding under section 207, we are here dealing with existing operations under section 5. It was not our intention in the prior report to reflect any new policy under the latter section. We think that under that section it has been and is our duty to consider the effect which a proposed new unified service will have on the continuance, efficiency, and economy of existing carrier services, and, if such proposed new unified service would adversely affect to any substantial extent the continuance, efficiency, and economy of existing carrier services, to the detriment of the public, whether it would result in offsetting advantages to the public and whether approval or disapproval would more nearly conform with the policy of Congress declared in the national transportation policy."

Compare *Virginia-Carolina Freight Lines, Inc.—Control—Burlington Truckers, Inc.*, 87 M.C.C. 341, 345.

Interchange of traffic is not controlling "because they interlined with other carriers shipments moving between points in their respective territories." See

Appendix C at page C-24, "Shayler Operations," and second to last paragraph page C-49, *Appendix C.*

It was especially noted above that the court held that existing carriers were entitled to "be protected." From the decisions cited, it is obvious that this is not necessarily true. Their interest must be weighed against various factors in determining where the public interest lies and subordinated thereto.

As a matter of fact and of law, we wish to stress the fact that certificates of public convenience and necessity which competing carriers hold have never been thought to create a vested right to freedom from competition, and this is obvious from the National Transportation Policy. *Norfolk Southern Bus Corporation vs. United States*, 96 Fed.Supp. 756, 761 (E.D., Va.); *North Coast Transportation Co. vs. United States*, 54 Fed.Supp. 448, 451-452 (N.D., Calif.), affirmed per curiam 323 U.S. 668; *Inland Motor Freight vs. United States*, 36 Fed.Supp. 885, 888-889 (D., Idaho).

The District Court did not touch the issues in this case, top, side or bottom. Appellants have had no judicial review.

As said by Mr. Chief Justice Warren in *American Trucking Association vs. United States and Interstate Commerce Commission*, 364 U.S. 1, 6:

> "The critical issue raised by appellants is whether the Commission exceeded its statutory authority by granting the permits in question to a railroad subsidiary without imposing more stringent limitations than it did. On this question,

> the lower court unanimously ruled against appellants. *This judgment must be evaluated in the light of this court's previous decisions, set against the background of Commission practice.*" (Emphasis ours).

To a considerable extent we have already discussed that "background," but let us explore that background and Commission "practices" in Section 5 proceedings further.

Admittedly the Commission "has been given a wide discretion," *but "that discretion has limits."* (Emphasis ours). *American Trucking Association vs. United States*, supra.

We have heretofore called attention to the vital questions to be determined in a Section 5 proceeding.

Upon each of the questions arising under *Section 5(2)(b)* and Section 5(2)(c) there is superimposed the declaration of the National Transportation Policy.

The Interstate Commerce Commission here discussed one of the questions. It reached a clearly erroneous and purely speculative conclusion. See footnote 3 and *Appendices D* and *E*.

The Commission *did not* discuss most of these questions and, *therefore, reached no conclusion.* The Commission *must* make findings on all material issues. The questions set out above are very material. Findings must necessarily be made.

Have Truck Line—Purchase—W. Don Maurer, 97 M.C.C. 361, 369, citing *Mason & Dixon Lines, Inc.*—

Control—Silver Fleet, 90 M.C.C. 829, 843, holds:

> *"It is, therefore, incumbent upon us to determine whether the compensatory benefits which would result from the unification would outweigh the possible adverse effects on the services and operations of competing carriers."* (Emphasis ours).

This the Commission did not do here, although the National Transportation Policy puts that very determination squarely on the Commission's back, for that policy is the yardstick by which the correctness of actions of the Interstate Commerce Commission will be measured. *Schauffer Transportation Co. vs. United States*, 355 U.S. 83; *American Trucking Association vs. A.T. & S.F.R.Co.*, ... U.S. ....., 18 L.Ed.2d 847, 863 (Advance sheets).

Commission's decision after decision so hold, and the National Transportation Policy requires it. The order of the Commission here under review is void.

In connection with evaluation in the light of the Supreme Court's decisions set against the background of Commission practice, we cite just a few cases not cited hereinabove. *J. W. Ringsby—Control; Ringsby Truck Line, Inc.—Control—Northern Transportation Co.*, 58 M.C.C. 594, 598; *T. S. Carter—Control; Interstate Motor Lines, Inc.—Control and Merger—Great American Dispatch, Inc.*, 58 M.C.C. 775, 786, 878, order set aside 243 Fed.Supp. 868, for lack of necessary findings; *Republic Van & Storage Co., Inc.—Purchase —Consolidated Van & Storage Co., Inc.*, 101 M.C.C. 93, 98, this case decided just about the same date as

the decision involved in the case at bar; *The Youngstown Cartage Co.—Control and Merger—Bigley Bros., Inc.*, 93 M.C.C. 318.

The Interstate Commerce Commission has applied the wrong statutory standard—criteria. *Section 5(2)(c), 49 U.S.C. 5(2)(c)* and the National Transportation Policy—the "yardstick" as we have shown, citing authority.

The Interstate Commerce Commission has not made essential findings, as we have pointed out. Several essential findings were not even considered. This is in violation of *Section 7(d), 5 U.S.C. 1008(d); Atchison, Topeka & Santa Fe Ry. Co. vs. United States*, 295 U.S. 193, 201-203; *Florida, et al vs. United States, et al*, 282 U.S. 194, 214-215.

In connection with one essential and required finding the Commission *possibly* intended to be making a finding; but if so, it, first, applied the wrong statutory standard, and, second, the finding is not supported by substantial evidence — a violation of *49 U.S.C. 1007(b)*. And that one attempted and possible finding *is not supported* by substantial evidence, contrary to the requirements of *5 U.S.C. 1009(e)(B)(5)*. The rule has been too many times announced by the Supreme Court to require citation of authority.

The one possible intended finding is so directly contrary to the evidence (see footnote 3, *Appendix D*, *Appendix E*, and the Examiner's Report, *Appendix C*, at pages C-27 - C-30) as to be "arbitrary, capricious (and) an abuse of discretion" in violation of *5 U.S.C.*

1009(e)(B)(1), and is not supported by substantial evidence *5 U.S.C. 1009(e)(b)(5)*.

The Interstate Commerce Commission's finding of adverse effect on existing carriers, and the issues being of the nature that they were, the Commission's action in refusing to take officials notice of its own records pursuant to *5 U.S.C. 1006(d)* and refusing to reopen the proceeding for their receipt in evidence, is so unfair, unreasonable, arbitrary, capricious and abuse of its discretion, and also the Commission's utter disregard of the rule of prejudicial error, *5 U.S.C. 1009(e)*, last sentence, that the order must be set aside.

The Interstate Commerce Commission's challenged order does not disclose the basic facts on which it made the order.

In absence of express findings by an administrative agency, they cannot be supplied by implication.

CONCLUSION

Probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted,

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PROOF OF SERVICE

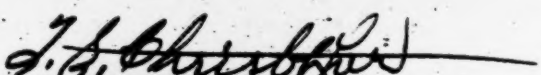
I, T. S. Christopher, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of November, 1967, I served copies of the foregoing Jurisdictional Statement on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Hon. Ralph S. Spritzer, Acting Solicitor General, Department of Justice, Washington, D. C. 20530;

to Hon. John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; to Hon. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Hon. Ernest Morgan, United States Attorney, San Antonio, Texas 78200; and to Hon. Mario J. Martinez, Assistant United States Attorney, El Paso, Texas 79900.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; and to Hon. Manny H. Smith, Attorney, Office of the General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

3. On the Attorneys for other Appellees herein, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to David Axelrod, Esq., Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603; to Bruce Hallmark, Esq., Goodman and Hallmark, Suite 13A, El Paso National Bank Building, El Paso, Texas 79901; to Wentworth E. Griffin, Esq., Reeder, Griffin & Dysart, 812 Midland Building, 1221 Baltimore Street, Kansas City, Missouri 46105; and to Phillip Robinson, Esq., James, Robinson, Felts & Starnes, The 904 Lavaca Building, Austin, Texas 78701.



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